THE DISSEISIN OF CHATTELS.

II.

The Nature of Ownership.

IN a preceding paper the writer endeavored to show, in the light of history, that disseisin was not a feudal doctrine, but a principle of property in general, personal as well as real. Conversion of chattels, we found, differed from disseisin of land in name, but not in substance. In each case the effect of the tort was to transfer the *res* to the wrong-doer, and to cut down the interest of the party wronged to a mere right to recover the *res*. Or, as the sagacious Brian, C. J., put it, the one had the property, the other only the right of property.

The disseisor, whether of land or chattels, was said to have the property, for these reasons. So long as the disseisin continued he had the power of present enjoyment of the *res;* his interest, although liable to be determined at any moment by the disseisee, was as fully protected against all other assailants as the interest of an absolute owner ; and, finally, his interest was freely transferable, both by his own act and by operation of law, although, of course, by reason of its precarious nature, its exchangeable value was small. The disseisee, on the other hand, was said to have a mere right of property, because, although he was entitled to recover the *res* by self-redress, or by action at law, this was his only right. The disseisin deprived him of the two conspicuous marks of perfect ownership. He could neither enjoy the land or chattel *in specie*, nor bring either of them to market. The interest of the disseisor might have little exchangeable value ; but that of the disseisee had none. For, as we have seen, this interest, being a *chose* in action, was not transferable at common law, either by conveyance *inter vivos*, or by will, nor even, as a rule, by operation of law.

Are these doctrines of the old common law accidents of English legal history, or are they founded in the nature of things ? Do they chiefly concern the legal antiquarian, or have they also a practical bearing upon the litigation of to-day ? To answer these

questions, it will be necessary, in the first place, to analyze the idea of "ownership" or "property," in the hope of working out a definition that will bear the test of application to concrete cases; and, secondly, an attempt must be made to explain the reason of the rule that *choses* in action are not assignable.

It is customary to speak of one as owner of a thing, although he has ceased to possess it for a time, either by his own act, as in the case of a lease or bailment, or without his consent, as in the case of a loss or disseisin. And yet every one would admit that the power of present enjoyment is one of the attributes of perfect ownership. It is evident, therefore, that it is only by an inaccurate, or, at least, elliptical use of language, that a landlord, bailor, loser, or disseisee can be called a true owner. The potential is treated as if actually existent. On the other hand, no one will affirm that the tenant, bailee, finder, or disseisor can be properly described as owner. For although they all have the power of present enjoyment, and, consequently, the power of transfer, their interest is either of limited duration, or altogether precarious. It would seem to follow, therefore, that wherever there is a lease, bailment, loss, or disseisin of a *res*, no one can be said to be the full owner of it. And this, it is submitted, is the fact. Only he in whom the power to enjoy and the unqualified right to enjoy concur can be called an owner in the full and strict sense of the term. The correctness of this conclusion is confirmed by the opinion of Blackstone, expressed with his wonted felicity. After speaking of the union in one person of the possession, the right of possession, and the right of property, he adds: "In which union consists a complete title to lands, tenements, and hereditaments. For it is an ancient maxim of the law, that no title is completely good, unless the right of possession be joined with the right of property; which right is then denominated a double right, *jus duplicatum*, or *droit droit*. And when to this double right the actual possession is also united, there is, according to the expression of Fleta, *juriset seisinæ conjunctio*, then, and then only, is the title completely legal."[1]

A true property may, therefore, be shortly defined as possession coupled with the unlimited right of possession. If these two elements are vested in different persons there is a divided ownership. Let us test these results by considering some of the modes by

[1] 2 Bl. Com. 199. See also ibid. 196: "And, at all events, without such actual possession no title can be completely good."

which a perfect title may be acquired by one who has neither, or only one of these two elements of complete ownership.

The typical case of title by original acquisition is title by occupation. For the occupier of a *res nullius* does acquire a perfect title and not merely possession. The fisherman who catches a fish out of the sea, or the sportsman who bags a bird, is at once absolute owner. He has possession with the unqualified right of possession, since there is no one *in rerum natura* who can rightfully interfere with him. It is on the same principle that a stranger who occupies land on the death of a tenant *pur auter vie* is owner of the residue of the life estate. For no one during the life of *cestui que vie* can legally disturb him.

A derivative title is commonly acquired from an owner by purchase or descent. The title in such cases is said to pass by transfer. For all practical purposes this is a just expression. But if the transaction be closely scrutinized, the physical *res* is the only thing transferred. The seller's right of possession, being a relation between himself and the *res*, is purely personal to him, and cannot, in the nature of things, be transferred to another. The purchaser may and does acquire a similar and coextensive right of possession, but not the *same* right that the seller had. What really takes place is this: the seller transfers the *res* and abandons or extinguishes his right of possession. The buyer's possession is thus unqualified by the existence of any right of possession in another, and he, like the occupant, and for the same reason, becomes absolute owner.

There is one curious case of derivative title which may be thought to confirm in a somewhat striking manner the accuracy of the definition here suggested. If a chattel, real or personal, was granted or bequeathed to one for life, the grantee or legatee became not only tenant for life, but absolute owner of it. In other words, there could be no reversion or remainder in a chattel. Possibly others may have been as much perplexed as the present writer in seeking for the reason of this rule. The explanation is, however, simple. The common-law procedure, established when such limitations of chattels were either unknown or extremely rare, gave the reversioner and remainderman no remedy against the life tenant. There was no action for chattels corresponding to the formedon in reverter and remainder for land. Detinue would, of course, lie in general on a contract of bail-

ment; but the contract of bailment, like a contract for the payment of money, must be conceivably performable by the obligor himself, and therefore before his death; he could not create a duty binding only his executor.[1] Consequently, there being no right of action against him, the life tenant's power of enjoyment was unrestricted. His ownership was necessarily absolute.[2]

Another rule, now obsolete, admits of a similar explanation. In the fourteenth century, as we have seen, a trespasser acquired the absolute property in the chattel wrongfully taken. The common law gave the dispossessed owner no remedy for its recovery. There was no assize of novel disseisin for chattels. Replevin was restricted to cases of wrongful distress. Detinue, originally founded upon a bailment, and afterwards extended to cases of losing and finding, was not allowed against a trespasser until about 1600. Trespass was therefore the owner's only action; but Trespass sounded in damages. The trespasser's possession being inviolable, he was necessarily owner.

A derivative title may be acquired by an equitable estoppel. If the owner of land permits another to sell and convey it, as if it were the seller's own, the purchaser gets at law only the seisin. The original owner's title, that is, his right to recover the seisin, is not otherwise affected by the conveyance. But a court of equity will grant a permanent injunction against the owner's assertion of his common-law right, and thereby practically nullify it, so that the purchaser's title is substantially perfect.

Where the two elements of ownership are severed, as by a disseisin, and vested in two persons, either may conceivably make his defective title perfect; but the mode of accomplishing this is different in the two cases. The disseisee may regain his lost possession by entry or recaption, by action at law, or by a voluntary surrender on the part of the disseisor. In each of these ways his title becomes complete, and is the result of a transfer, voluntary or involuntary, of the physical *res*.

The perfection of the title of the disseisor, on the other hand, is

[1] Perrot *v.* Austin, Cro. El. 222; Cover *v.* Stem, 67 Md. 449.

[2] After a time the chancellors gave relief by compelling life tenants to give bonds that the reversioners and remaindermen should have the chattels. Warman *v.* Seaman, Freem. C. C. 306, 307; Howard *v.* Duke of Norfolk, 2 Sw. 464; 1 Fonb. Eq. 213, n. And now either in equity or at law the reversioners and remaindermen are amply protected. The learning on this point, together with a full citation of the authorities, may be found in Gray, Perpetuities, §§ 78–98.

not accomplished through a transfer to him of the disseisee's right to recover possession. In the very nature of things, this right of the dispossessed owner cannot be conveyed to the wrongful possessor. It would be absurd to speak of such possessor acquiring a right to recover possession from himself, which would be the necessary consequence of the supposed transfer. But the disseisee's right, although not transferable, may, nevertheless, be extinguished. And since, by its extinguishment, the possession of the disseisor becomes legally unassailable, the latter's ownership is thereby complete.

The extinguishment may come about in divers ways:—

(1.) *By a release.* "Releases of this kind must be made either to the disseisor, his feoffee, or his heir. In all these cases the possession is in the releasee; the right in the releasor and the uniting the right to the possession completes the title of the releasee."[1] In feoffments and grants it was a rule that the word "heirs" was essential to the creation of an estate of inheritance. But, as Coke tells us, "When a bare right is released, as when the disseisee releases to the disseisor all his right, he need not speake of his heires."[2] This distinction would seem to be due to the fact that a release operates, not as a true conveyance, but by way of extinguishment.

(2.) *By marriage.* As we have seen in the preceding article,[3] if a woman, who was dispossessed of her land or chattels, married, her right of action against the wrong-doer not being assignable, did not pass to her husband. If, therefore, she died before possession was regained, the husband had no curtesy in the land, and the right to recover the chattel passed to her representative. But if the dispossessed woman can be imagined to marry the dispossessor, it seems clear, although no authority has been found,[4] that in that highly improbable case the marriage, by suspending and consequently extinguishing her right of action, would give the husband a fee simple in the land and absolute ownership of the chattel.

(3.) *By death.* If a man were disseised by his eldest son and died, the son and heir would be complete owner; for death would

[1] Co. Lit. 274 a, Buker's note [237].

[2] Co. Lit. 9 b.

[3] *Supra*, 27, 38.

[4] A woman by marrying her bailee or debtor extinguished the bailment or debt. Y. B. 21 H. VII. 29–4.

have removed the only person in the world who could legally assail his possession. The law of trusts furnishes another illustration. The right of a *cestui que trust*, it is true, is not a right *in rem*, but a right *in personam*. Nevertheless it relates to a specific *res*, and so long as it exists, practically deprives the trustee of the benefits of ownership. If this right of the *cestui que trust* could be annihilated, the trustee would be owner in substance as well as in name. This annihilation occurred in England, if the *cestui que trust* of land died intestate and without heirs, inasmuch as a trust of land did not escheat to the crown or other feudal lord.[1] The trust was said to sink for the benefit of the trustee, and for the obvious reason that no one could call him to account.

(4.) *By lapse of time.* Title by prescription was an important chapter in the Roman law. Continuous possession, in good faith, although without right, gave the possessor, after a given time, a perfect title. The civilians, as is shown by the requisite of *bona fides*, looked at the matter chiefly from the side of the adverse possessor. In England the point of view is different. English lawyers regard not the merit of the possessor, but the demerit of the one out of possession. The statutes of limitation provide, in terms, not that the adverse possessor shall acquire title, but that one who neglects for a given time to assert his right shall not thereafter enforce it. Nevertheless, the question of *bona fides* apart, there is no essential difference between the two systems on the point under discussion. In the English law, no less than in the Roman law, title is gained by prescriptive acquisition.[2] As a matter of legal reasoning this seems clear. For, as already pointed out, the only imperfection in the disseisor's title is the disseisee's right to recover possession. When the period of limitation has run, the statute, by forbidding the exercise of the right, virtually annihilates it, and the imperfect title must become perfect.

This conclusion is abundantly supported by authority from

[1] Burgess *v.* Wheate, 1 W. Bl. 123; Ames Cas. on Trusts, 501, 511, n. 1. By St. 47 and 48 Vict. c. 71, § 4, equitable interests do now escheat. It has been urged by Mr. F. W. Hardman, with great ability, that a trust in land ought to have been held to pass to the sovereign after the analogy of *bona vacantia*. 4 L. Q. Rev. 330–336. And this view has met with favor in this country. Johnston *v.* Spicer, 107 N. Y. 185; Ames, Cas. on Trusts, 511, n. 1.

[2] The writer regrets to find himself in disaccord upon this point with the opinion expressed incidentally by Professor Langdell, in his summary of Equity Pleading (2 ed.), § 122.

Bracton's time down: "*Longa enim possessio . . . parit jus possidendi et tollit actionem vero domino petenti, quandoque unam, quandoque aliam, quandoque omnem . . . Sic enim . . . acquiritur possessio et liberum tenementum sine titulo et traditione per patientiam et negligentiam veri domini.*" [1]

Blackstone is even more explicit: "Such actual possession is *prima facie* evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right by degrees, ripen into a perfect and indefeasible title." [2] Lord Mansfield may also be cited: "Twenty years' adverse possession is a positive title to the defendant; it is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession." [3]

Sir Thomas Plummer, M. R., has expressed himself to the same effect as to equitable interests: "If the negligent owner has forever forfeited by his laches his right to any remedy to recover, he has in effect lost his title forever. The defendant keeps possession without the possibility of being ever disturbed by any one. The loss of the former owner is necessarily his gain; it is more, he gains a positive title under the statute at law, and by analogy in equity." [4]

There are, to be sure, occasional *dicta* to the effect that the statute of James I. only barred the remedy without extinguishing the right, and that the right which would support a writ of right or other droitural action never died. An immortal right to bring an eternally prohibited action is a metaphysical subtlety that the present writer cannot pretend to understand.[5] Fortunately these

[1] Bract. 52 a.

[2] 2 Bl. Com. 196; see also 3 Bl. Com. 196; 1 Hayes, Conveyancing (5 ed.), 270; Stokes *v.* Berry, 2 Salk. 421, per Lord Holt. Butler's note in Co. Lit. 239 a is as follows: "But if A. permits the possession to be withheld from him [by B.] beyond a certain period of time, without claiming it . . . B.'s title in the eye of the law is strengthened, and A. can no longer recover by a possessory action, and his only remedy then is by an action on the right . . . so that if he fails to bring his writ of right within the time limited for the bringing of such writs, he is remediless, and the title of the dispossessor is complete."

[3] Taylor *v.* Horde, 1 Burr. 60, 119.

[4] Cholmondeley *v.* Clinton, 2 Jac. & W. 1, 156.

[5] The notion that a debt survives the extinction of all remedies for its enforcement is peculiar to English and American law, and even in those systems cannot fairly be deduced from the authorities commonly cited in its support. It is not because the debt continues, that a new promise to pay a debt barred by the statute is binding; but because the extinguishment of the creditor's right is not equivalent to performance by the debtor. The moral duty to pay for the *quid pro quo* remains, and is sufficient to support the new promise. It is because this moral duty remains that the debtor, though discharged from all actions, cannot, without payment, recover any security that the creditor may hold. Again, it has been urged that the statute affects the remedy, but not the right, because

dicta have had no other effect than to bring some unnecessary confusion of ideas into this subject. The logic of facts has proved irresistible in the decision of concrete cases. The courts have uniformly held that a title gained by lapse of time is not to be distinguished from a title acquired by grant. Thus, if the prescriptive owner desires to transfer his title, he must observe the usual formalities of a conveyance; he cannot revest the title in the disseisee by disclaiming the benefit of the statute.[1] His title is so perfect that a court of equity will compel its acceptance by a purchaser.[2] A repeal of the statute will not affect his title.[3] If dispossessed by the disseisee after the statute has run, he may enforce his right of entry or action against him as he might against any other intruder.[4] He may even maintain a bill in equity to remove the cloud upon his title, created by the documentary title of the original owner.[5] The English cases cited in support of these propositions, it may be urged, were decided under St. 3 and 4 Wm. IV. c. 27, the 34th

the lapse of the statutory time in the jurisdiction of the debtor is no bar to an action in another jurisdiction. But this rule admits of another explanation. A debt being transitory, a creditor has an option, from the moment of its creation, to sue the debtor wherever he can find him. The expiration of the period of limitation in one jurisdiction, before he exercises his option, has no effect upon his right to sue elsewhere. But it extinguishes his right to sue in the jurisdiction where the statute has run, and a subsequent repeal of the statute will not revive it. Cooley, Const. Lim. 365. The case of Campbell *v.* Holt, 115 U. S. 620, *contra*, stands almost alone.

[1] Sanders *v.* Sanders, 19 Ch. Div. 373; Hobbs *v.* Wade, 36 Ch. D. 553; Jack *v.* Walsh, 4 Ir. L. R. 254; Doe *v.* Henderson, 3 Up. Can. Q. B. 486; McIntyre *v.* Canada Co., 18 Grant, Ch. 367; Bird *v.* Lisbros, 9 Cal. 1, 5 (*semble*); School District *v.* Benson, 31 Me. 381; Austin *v.* Bailey, 37 Vt. 219; Hodges *v.* Eddy, 41 Vt. 485.

[2] Scott *v.* Nixon, 3 Dr. & War. 388, 405; Sands *v.* Thompson, 22 Ch. D. 614; Games *v.* Bonnor, 54 L. J. Ch. 517.

[3] Campbell *v.* Holt, 115 U. S. 620, 622 (*semble*); Trim *v.* McPherson, 7 Cold. 15; Grigsby *v.* Peak, 57 Tex. 142; Spreeker *v.* Wakely, 11 Wis. 432; Hill *v.* Kricke, 11 Wis. 442; Knox *v.* Cleveland, 13 Wis. 245.

[4] Brassington *v.* Llewellyn, 27 L. J. Ex. 297; Bryan *v.* Cowdal, 21 W. R. 693; Rains *v.* Buxton, 14 Ch. D. 537; Groome *v.* Blake, 8 Ir. C. L. 428; Mulholland *v.* Conklin, 22 Up. Can. C. P. 372; Johnston *v.* Oliver, 3 Ont. R. 26; Holtzapple *v.* Phillibaum, 4 Wash. 356; Barclay *v.* Smith, 66 Ala. 230 (*semble*); Jacks *v.* Chaffin, 34 Ark. 534; Clarke *v.* Gilbert, 39 Conn. 94; Doe *v.* Lancaster, 5 Ga. 39; McDuffee *v.* Sinnott, 119 Ill. 449; Brown *v.* Anderson, 90 Ind. 93; Chiles *v.* Jones, 4 Dana, 479; Armstrong *v.* Risteau, 5 Md. 256; Littlefield *v.* Boston, 146 Mass. 268; Jones *v.* Brandon, 59 Miss. 585; Biddle *v.* Mellon, 13 Mo. 335; Jackson *v.* Oltz, 8 Wend. 440; Pace *v.* Staton, 4 Ired. 32; Pederick *v.* Searle, 5 S. & R. 236; Abel *v.* Hutto, 8 Rich. 42.

[5] Low *v.* Morrison, 14 Grant, Ch. 192; Pendleton *v.* Alexander, 8 Cranch, 462; Arrington *v.* Liscom, 34 Cal. 365; Tracy *v.* Newton, 57 Iowa, 210; Rayner *v.* Lee, 20 Mich. 384; Stettnische *v.* Lamb, 18 Neb. 619; Watson *v.* Jeffrey, 39 N. J. Eq. 62; Parker *v.* Metzger, 12 Oreg. 407.

section of which expressly extinguishes the title of the original owner at the end of the time limited. But inasmuch as the American cases cited were decided under statutes substantially like St. 21 James I. c. 16, which contains no allusion to any extinguishment of title, the 34th section referred to may fairly be regarded as pure surplusage.

The conclusions reached in regard to land apply with equal force to chattels. The vice in the converter's title is the dispossessed owner's right to recover the chattel by reception or action. The bar of the statute operating as a perpetual injunction against the enforcement of the right of action virtually destroys that right; and the policy of the law will not permit the dispossessed owner's right to recover by his own act to survive the extinguishment of his right to recover by legal process.[1] The vice being thus removed, the converter's title is unimpeachable; and it is as true of chattels as of land that a prescriptive title is as effective for all purposes as a title by grant. Accordingly, the adverse possessor cannot restore the title to the original owner by waiving the benefit of the statute.[2] His title is not affected by a repeal of the statute.[3] If dispossessed by the original owner, he may maintain Detinue or Replevin against the latter, as he might against any stranger.[4] A

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[1] *Ex parte* Drake, 5 Ch. Div. 866, 868; Chapin *v.* Freeland, 142 Mass. 383; cases cited *infra*, n. 4.

According to Littleton, a right of entry or reception is not extinguished by a release of all actions; and in Put *v.* Rawsterne, Skin. 48, 57, 2 Mod. 318, there is a *dictum* that the right of reception is not lost, although all rights of action are merged in a judgment in trover. It may be that Littleton's interpretation would be followed to-day, although it certainly savors of scholasticism. But the *dictum* in Put *v.* Rawsterne, surely, cannot be law.

[2] Morris *v* Lyon, 84 Va 331.

[3] Campbell *v.* Holt, 115 U. S. 623 (*semble*); Jones *v.* Jones, 18 Ala. 245, 253 (*semble*); Davis *v.* Minor, 2 Miss. 183, 189-90 (*semble*); Power *v.* Telford, 60 Miss. 195 (*semble*); Moore *v.* State, 43 N. J. 203, 206 (*semble*); Yancy *v.* Yancy, 5 Heisk. 353; Brown *v.* Parker, 28 Wis. 21, 28 (*semble*).

[4] Brent *v* Chapman, 5 Cranch, 358; Shelby *v.* Guy, 11 Wheat. 361 (*semble*); Howell *v.* Hair, 15 Ala. 194; Sadler *v.* Sadler, 16 Ark. 628; Wynn *v.* Lee, 5 Ga. 217 (*semble*); Robbins *v.* Sackett, 23 Kas. 301; Stanley *v.* Earl, 5 Litt. 281; Smart *v.* Baugh, 3 J. J. Marsh 363 (*semble*); Clark *v.* Slaughter, 34 Miss. 65; Chapin *v.* Freeland, 142 Mass. 383 (Field, J., diss.); Baker *v.* Chase, 55 N. H. 61, 63 (*semble*); Powell *v.* Powell, 1 Dev. & B. Eq. 379; Call *v.* Ellis, 10 Ired. 250, Cockfield *v.* Hudson, 1 Brev. 311; Gregg *v.* Bigham, 1 Hill (S. Ca.), 299; Simon *v.* Fox, 12 Rich. 392; McGowan *v.* Reid, 27 S. Ca. 262, 267 (*semble*); Kegler *v* Miles, Mart. & Y. 426; Partee *v.* Badget, 4 Yerg. 174; Wheaton *v.* Weld, 9 Humph. 773; Winburn *v.* Cochran, 9 Tex. 123; Connor *v.* Hawkins, 71 Tex. 582; Preston *v.* Briggs, 16 Vt. 124, 130; Newby *v* Blakey, 3 Hen. & M. 57.

title gained by lapse of time in one State is good everywhere.[1] If insolvent, he cannot surrender the chattel to the original owner.[2] If sued by the original owner, he may plead in denial of the plaintiff's title.[3]

In the cases thus far considered the land or chattel has been assumed to continue in the possession of the disseisor or converter until the bar of the statute was complete. But before that time the wrong-doer may have parted with the *res* by a sale or other transfer, or he may have been, in turn, deprived of it by a second wrong-doer.

If the thing has passed to the new possessor by a sale, the change of possession will produce, so far as the statute of limitations is concerned, only this difference: the title will vest at the end of the period of limitation in the new possessor, instead of the original disseisor or converter. Let us suppose, for example, that B. disseises A., occupies for ten years, and then conveys to C. If the statutory period be assumed to be twenty years, B.'s title at the time of the transfer is good against every one except A., but is limited by the latter's right to recover possession at any time during the ensuing ten years. B.'s title, thus qualified, passes to C. At the end of the second ten years the qualification vanishes, and C. is complete owner. This, it is believed, is the rationale of the oft-repeated rule that the times of successive adverse holders, standing in privity with each other, may be tacked together to

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[1] Shelby *v* Guy, 11 Wheat. 361; Goodman *v.* Munks, 8 Port. 84, 94-5; Howell *v.* Hair, 15 Ala. 194 (*semble*); Newcombe *v.* Leavitt, 22 Ala. 631; Wynn *v.* Lee, 5 Ga. 217; Broh *v.* Jenkins, 9 Mart 526 (*semble*); Davis *v.* Minor, 2 Miss. 183 (*semble*); Fears *v.* Sykes, 35 Miss. 633; Moore *v.* State, 43 N. J. 203, 205, 208 (*semble*); Alexander *v.* Burnet, 5 Rich. 189 (*semble*); Sprecker *v.* Wakeley, 11, Wis. 432, 440 (*semble*).

[2] Gath *v.* Barksdale, 5 Munf. 101.

[3] Campbell *v.* Holt, 115 U. S. 623 (*semble*); Smart *v.* Baugh, 3 J. J. Marsh. 363; Smart *v.* Johnson, 3 J. J. Marsh. 373; Duckett *v.* Crider, 11 B. Mon. 188; Elam *v.* Bass, 4 Munf. 301.

The general rule is asserted also in Bryan *v.* Weems, 29 Ala. 423; Pryor *v.* Ryburn, 16 Ark. 671; Crabtree *v.* McDaniel, 17 Ark. 222; Machin *v.* Thompson, 17 Ark. 199; Blackburn *v.* Morton, 18 Ark. 384; Morine *v.* Wilson, 19 Ark. 520; Ewell *v.* Tidwell, 20 Ark. 136; Spencer *v.* McDonald, 22 Ark. 466; Curtis *v.* Daniel, 23 Ark. 362; Paschal *v.* Davis, 3 Ga. 256, 265; Wellborn *v.* Weaver, 17 Ga. 267; Thompson *v.* Caldwell, 3 Litt. 136; Orr *v.* Pickett, 3 J. J. Marsh. 269, 278; Martin *v.* Dunn, 30 Miss. 264, 268; Hardeson *v.* Hays, 4 Yerg. 507; Prince *v.* Broach, 5 Sneed, 318; Kirkman *v.* Philips, 7 Heisk. 222; Munson *v.* Hallowell, 26 Tex. 475; Merrill *v.* Bullard, 59 Vt., 389; Garland *v.* Enos, 4 Munf. 504.

Goodwin *v.* Morris, 9 Oreg. 322, is a solitary decision to the contrary.

make up the period of limitation. In regard to land, this rule of tacking is all but universal.[1]

The decisions in the case of chattels are few. As a matter of principle, it is submitted this rule of tacking is as applicable to chattels as to land.[2] A denial of the right to tack would, furthermore, lead to this result. If a converter were to sell the chattel, five years after its conversion, to one ignorant of the seller's tort, the dispossessed owner's right to recover the chattel from the purchaser would continue five years longer than his right to recover from the converter would have lasted, if there had been no sale. In other words, an innocent purchaser from a wrong-doer would be in a worse position than the wrong-doer himself,—a conclusion as shocking in point of justice as it would be anomalous in law.

It remains to consider the operation of the statute when the disseisor or converter has been, in turn, dispossessed by a wrong-doer. A change of possession accomplished in this mode has no more effect upon the right of the original owner than a change of possession by means of a transfer. But the rights and relations of the two successive adverse possessors are fundamentally different in the two cases. Let us suppose, as before, that B disseises A., and occupies for ten years, and then, instead of selling to C., is disseised

[1] *Ancestor and heir.* Doe *v.* Lawley, 13 Q. B. 954; Clarke *v.* Clarke, Ir R. 2 C. L. 395; Currier *v.* Gale, 9 All. 522; Duren *v.* Kee, 26 S. Ca. 224.

Devisor and devisee. Newcomb *v.* Stebbins, 9 Met. 545; Shaw *v.* Nicholay, 30 Mo. 99; Caston *v.* Caston, 2 Rich. Eq. 1.

Vendor and vendee. Simmons *v.* Shipman, 15 Ont. R. 301; Christy *v.* Alford, 17 How. 601; Riggs *v.* Fuller, 54 Ala. 141; Smith *v.* Chapin, 31 Conn. 530; Webster *v.* Anderson, 73 Ill. 439; Durel *v.* Tennison, 31 La. An. 538; Chadbourne *v.* Swan, 40 Me. 260; Hanson *v.* Johnson, 62 Md. 25; Crispen *v.* Hannavan, 50 Mo. 536; McNeely *v.* Langan, 22 Oh. St. 32; Overfield *v.* Christie, 7 S. & R. 173; Clarke *v.* Chase, 5 Sneed, 636; Cook *v.* Dennis, 61 Tex. 246; Day *v.* Wilder, 47 Vt. 583. But see *contra*, King *v.* Smith, Rice, 10; Johnson *v.* Cobb, 29 S. Ca. 372.

Lessor and lessee. Melvin *v.* Proprietors, 5 Met. 15; Sherin *v.* Brackett, 36 Minn. 152.

Judgment debtor and execution purchaser. Searcy *v.* Reardon, 1 A. K. Marsh. 3; Chouquette *v.* Barada, 23 Mo. 331; Scheetz *v.* Fitzwater, 5 Barr, 126.

Wife and tenant by curtesy. Colgan *v.* Pellens, 48 N. J. 27, 49 N. J. 694.

See further, McEntie *v.* Brown, 28 Ind. 347; Haynes *v.* Boardman, 119 Mass. 414; St. Louis *v.* Gorman, 29 Mo. 593; Hickman *v.* Link, 97 Mo. 482.

[2] Bohannon *v.* Chapman, 17 Ala. 696; Newcombe *v.* Leavitt, 22 Ala. 631; Shute *v.* Wade, 5 Yerg. 1, 12 (*semble*); Norment *v.* Smith, 1 Humph. 46, 48 (*semble*); (but see Wells *v.* Ragland, 1 Swan, 501; Hobbs *v.* Ballard, 5 Sneed, 395), *accord.*

Tacking not being allowed in regard to land in South Carolina, is naturally not permitted there in the case of chattels Beadle *v.* Hunter, 3 Strob. 331; Alexander *v.* Burnet, 5 Rich. 189; Dillard *v.* Philson, 5 Strob. 213 (*semble*).

by C., who occupies for another ten years. At the moment of the second disseisin B's possession is qualified by A.'s right to recover the *res* at any time during the next ten years. After the disseisin C.'s possession would, of course, be subject to the same qualification. But B. had as against the rest of the world the two elements of perfect ownership,—possession and the unlimited right of possession. C. by disseising B. severs these two elements of B.'s title, good against every one but A., in the same way that B. by his tort had previously divided A.'s ownership, good against every one without exception. Just as by the original disseisin B. acquired the *res* subject to A.'s right of entry or action for twenty years, so by the second disseisin C. acquires the *res* subject to B.'s right of entry or action for an equal period. There would be, therefore, two defects in C.'s title; namely, A.'s right to recover the *res* for ten years, and B.'s right to recover it for twenty years from the time of the second disseisin. If A. fails to assert his claim during his ten years, his right is gone forever. One of the defects of C.'s title is blotted out. He becomes owner against every one but B. He may, accordingly, at any time thereafter defend successfully an action brought by A., or if forcibly dispossessed by A., he may recover the *res* from him by entry or action as he might against any other dispossessor, B. alone excepted. In other words, C., although a disseisor, and therefore not in privity with B., may tack the time of B.'s adverse possession to his own to make out the statutory period against A. This tacking is allowed in England, Canada, and in several of our States.[1] There are, however, some decisions and a widespread opinion to the contrary in this country.[2] But

[1] Doe *v.* Carter, 9 Q. B. 863; Kipp *v.* Synod, 33 Up. Can. Q. B. 220; Fanning *v.* Willcox, 3 Day, 258; Smith *v.* Chapin, 31 Conn. 530 (*semble*); Shannon *v.* Kinny, 1 A. K. Marsh. 3; Hord *v.* Walton, 2 A. K. Marsh. 620; Fitzrandol h *v.* Norman, 2 Tayl. 131; Candler *v.* Lunsford, 4 Dev. & B. 407; Davis *v.* McArthur, 78 N. C. 357; Cowles *v.* Hall, 90 N. C. 330. See, also, 1 Dart, V. & P. (6 ed.) 464–6; Pollock and Wright, Possession 23.

[2] San Francisco *v.* Fulde, 37 Cal. 349; Doe *v.* Brown, 4 Ind. 143 (*semble*); Sawyer *v.* Kendall, 10 Cush. 241; Witt *v.* St. Paul Co., 38 Minn, 122 (*semble*); Locke *v.* Whitney, 63 N. H. 597 (*semble*); Jackson *v.* Leonard, 9 Cow. 653; Moore *v.* Collishaw, 10 Barr, 224; Sh.ack *v.* Zubler, 34 Pa. 38; Erck *v.* Church, 87 Tenn. 575; Graeven *v.* Dieves, 68 Wis. 317 (*semble*). See, also, Riopelle *v.* Hilman, 23 Mich. 33.

Doe *v.* Barnard, 13 Q. B. 945, lends no countenance to the cases just cited. In that case B. occupied without right for eighteen years, and died leaving a son; C. excluded the son and occupied for thirteen years, when he was ousted out by A., the original owner. C. brought ejectment against A., but failed; not, however, because of any right in A.; on the contrary, the latter, as plaintiff, in an ejectment against C., had been already defeated

this opinion, with all deference, must be deemed erroneous. The laches of the original owner, who remains continuously dispossessed throughout the statutory period, is the same, and should be attended with the same consequences to him, whether the adverse possession be held continuously by one or several persons, and whether subsequent possessors do or do not stand in privity with their predecessors. If, indeed, the adverse possession is not continuous, if, for instance, B., after disseising A., abandons the land, leaving the possession vacant, and C. subsequently enters without right upon this vacant possession, he cannot, of course, tack his time to B.'s.[1] Upon B.'s abandonment of the land the disseisin comes to an end. In legal contemplation, A.'s possession revives.[2] Having the right to possess, and no one else having actual possession, he is in a position analogous to that of an heir, or conusee of a fine, before entry, and like them has a seisin in law. C.'s disseisin has, therefore, the same effect as if A. had never been disseised by B., and A.'s right of entry or action must continue until C. himself, or C. and his successors, have held adversely for twenty years. If the distinction here suggested between successive disseisins with continuous adverse possession, and successive disseisins without

because the statute had extinguished his title. Doe *v.* Carter, 9 Q. B. 863. The court decided against C. in Doe *v.* Barnard, on the ground that he, being a disseisor of A.'s heir, who had the superior right, could not maintain ejectment at all, even against a wrongful dispossessor. This view, although allowed in Nagle *v.* Shea, Ir. R. 8 C. L. 224, is, of course, untenable, being a departure from the law as settled by the practice of six centuries. For, from time immemorial, a disseisor, if dispossessed by a stranger, has had the right to recover the land from the wrong-doer by entry, by assize, or by ejectment. Bract. f. 165 a; 1 Nich. Britt. 296; Bateman *v.* Allen, Cro. El. 437, 438; Jenk. Cent. 42; Allen *v.* Rivington, 2 Saund. 111; Smith *v.* Oxenden, 1 Ch. Ca. 25; Doe *v.* Dyball, M. & M. 346; Davison *v.* Gent, 1 H. & N. 744, per Bramwell, B. This time-honored rule is universally prevalent in this country. The doctrine of Doe *v.* Barnard is open to the further criticism that it is a distinct encouragement of private war as a substitute for legal proceedings. For C., the unsuccessful plaintiff, has only to eject A. by force in order to turn the tables upon him. Once in possession, he could defeat a new ejectment brought by A., in the same way that he himself had been rebuffed; that is, by setting up the superior right of B.'s heir. Fortunately Doe *v.* Barnard has been overruled, in effect, by Asher *v.* Whitlock, L. R. 1 Q. B. 1. The suggestion of Mellor, J., in the latter case, although adopted by Mr. Pollock (Poll. & Wr., Poss. 97, 99), that the former case may be supported on the ground that the superior right of B.'s heir was disclosed by the plaintiff's evidence, will hardly command approval. If an outstanding superior right of a third person is a relevant fact, it must be competent for the defendant to prove it; if it is irrelevant, its disclosure by the plaintiff's evidence must be harmless.

[1] Brandt *v.* Ogden, 1 Johns. 156; Malloy *v.* Bruden, 86 N. C. 251; Taylor *v.* Burnside, 1 Grat. 165. See, also, Brown *v.* Hanauer, 48 Ark. 277.

[2] Agency Co. *v.* Short, 13 App. Cas. 793.

continuous adverse possession, had been kept in mind, a different result, it is believed, would have been reached in the American cases.[1]

If the conclusions here advocated are true in regard to land, they would seem to be equally valid where there is a continuous adverse possession of chattels by successive holders, although there is no privity between them. But no decisions have been discovered upon this point.[2]

(5.) *By judgment.* One who has been wrongfully dispossessed of a chattel has the option of suing the wrong-doer in Replevin, Detinue, Trover, or Trespass. A judgment in Replevin enables him to keep the chattels already replevied and delivered to him by the sheriff, and a judgment in Detinue establishes his right to recover the chattel *in specie*,[3] or, that being impracticable, its value. A judgment in Trespass or Trover, on the other hand, is for the recovery of the value only, as damages. Inasmuch as a defendant ought not to be twice vexed for a single wrong, a judgment in any one of these forms of action is not only a merger of the right to resort to that one, but is also a bar against the others.[4] Accordingly, a judgment in Trespass or Trover against a sole wrong-doer who, at the time of judgment recovered, is still in possession of the chattel operates like the statute of limitations, and annihilates the dispossessed owner's right to recover the chattel. The converter's possession being thus set free from adverse claims, changes into ownership.[5]

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[1] It is a significant fact that in most of these cases Brandt *v.* Ogden, 1 Johns. 156, a case where the adverse possession was not continuous, was cited as a decision in point.

[2] In Norment *v.* Smith, 1 Humph. 46; Moffatt *v.* Buchanan, 11 Humph. 369; Wells *v.* Ragland, 1 Swan. 501; Hobbs *v.* Ballard, 5 Sneed, 395, there was in fact a privity; but the court thought otherwise, and accordingly disallowed tacking, as the same court denies the right to tack in the case of land if there is no privity.

[3] *Ex parte* Drake, 5 Ch. Div. 866; *Re* Scarth, 10 Ch. 234; Sharpe *v.* Gray, 5 B. Mon. 4; Norrill *v.* Corley, 2 Rich. Eq. 288, n. (*a*).

[4] Lacon *v.* Barnard, Cro. Car. 35; Put *v.* Rawsterne, T. Ray. 472, 2 Show. 211 (*semble*); Hitchin *v.* Campbell, 2 W. Bl. 827; Lovejoy *v.* Wallace, 3 Wall. 1, 16 (*semble*); Barb *v.* Fish, 8 Black, 481; Rembert *v.* Hally, 10 Humph. 513. Similarly, if the converted chattel has been sold, the owner, by recovering a judgment in *assumpsit*, extinguishes all his other remedies against the converter. Smith *v.* Baker, L. R. 8 C. P. 350 (*semble*); Bradley *v.* Brigham, 149 Mass. 141, 144–5; Boots *v.* Ferguson, 46 Hun, 129; Wright *v.* Ritterman, 4 Rob. 704.

[5] The chattel may therefore be taken on execution by a creditor of the converter. Rogers *v.* Moore, Rice, 60; Norrill *v.* Corley, 2 Rich. Eq. 288, n. (*a*); Foreman *v.* Neilson, 2 Rich. Eq. 287. See, also, Morris *v.* Beckley, 2 Mill, C. R. 227. A purchaser from a converter after judgment should take a perfect title. Goff *v.* Craven, 34 Hun, 150, *contra*, would seem to be a hasty decision.

If the change of possession is before judgment, there is a difference. Let us suppose, for instance, that B. converts the chattel of A., and, before judgment recovered against him in Trespass or Trover, sells it to C., or is in turn dispossessed by C. C., the new possessor, will hold the chattel, as B. held it, subject to A.'s right to recover it. The change of possession simply enlarges the scope of A.'s remedies; for his new rights against C. do not destroy his old right to sue B. in Trespass or Trover. Nor will an unsatisfied judgment against B. in either of these actions affect his right to recover the chattel from C.[1] It is no longer a question of double vexation to one defendant for a single wrong. Not until the judgment against B. is satisfied can C. use it as a bar to an action against himself. A different principle then comes into play, namely, that no one should receive double compensation for a single injury.[2]

Another case can be put where the dispossessed owner has concurrent rights against two or more persons. B. and C. may have jointly dispossessed A., instead of being successive holders of the converted chattel. Under these circumstances A. may proceed against B. and C. jointly or severally. If he obtain a joint judgment in Trespass or Trover, all his rights against both are merged therein, and his title to the chattel is extinguished. But if he obtain a separate judgment against one, he may still bring Replevin or Detinue against the other to recover the chattel, or Trespass or Trover for its value; for the latter cannot invoke the maxim, *nemo bis vexari debet pro eadem causa*.[3] Not until the judgment

[1] Matthews *v.* Menedger, 2 McL. 145; Spivey *v.* Morris, 18 Ala. 254; Dow *v.* King (Ark.) 12 S. W. Rep. 577; Atwater *v.* Tupper, 45 Conn. 144; Sharp *v.* Gray, 5 B. Mon. 4; Osterhout *v.* Roberts, 8 Cow. 43. But see *contra*, March *v.* Pier, 4 Rawle, 273, 286 (*semble*); Fox *v.* Northern Liberties, 3 W. & S. 103, 106 (*semble*); Wilburn *v.* Bogan, 1 Speer, 179.

Similarly, an unsatisfied judgment against C. is no bar to a subsequent action against B. McGee *v.* Overby, 12 Ark. 164; Hopkins *v.* Hersey, 20 Me. 449; Bradley *v.* Brigham, 149 Mass. 141, 144-5. But see *contra*, Murrell *v.* Johnson, 1 Hen. & M. 449.

[2] Cooper *v.* Shepherd, 3 C. B. 266.

[3] Lovejoy *v.* Murray, 3 Wall. 1; Elliot *v.* Porter, 5 Dana, 299; Elliott *v.* Hayden, 104 Mass. 180; Floyd *v.* Brown, 1 Rawle, 121 (*semble*); Fox *v.* Northern Liberties, 3 W. & S. 103 (*semble*); Sanderson *v.* Caldwell, 2 Ark. 195.

But see *contra*, Brown *v.* Wootton, Yelv. 67, Cro. Jac. 73; Adams *v.* Broughton, Andr. 18; Buckland *v.* Johnson, 15 C. B. 145; Hunt *v.* Bates, 7 R. I. 217. In Brinsmead *v.* Harrison, L. R. 6 C. P. 584, L. R. 7 C. P. 547, one of the joint converters pleaded, to a court in Detinue, a prior judgment against his companion. The plaintiff now assigned a detention subsequent to the joint taking. The court, with some reluctance, held the

against the one is satisfied can it be used as a bar in an action against the other. The controversy whether the title to a converted chattel vests in a defendant by a simple judgment, or only after the satisfaction of the judgment, is, therefore, but another battle of the knights over the gold and silver shield. Under some circumstances the title changes by the judgment alone; in other cases satisfaction is necessary to produce that result.

J. B. Ames.

CAMBRIDGE, 1890.

[*To be concluded in March.*]

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plea good, but also supported the replication, thus neutralizing one error by the commission of another, and so bringing about the same result as the American cases. The fallacy of the notion that the detention of a chattel by the wrongful taker is a fresh tort, was exposed, curiously enough, by the same court in an earlier case in the same volume; Wilkinson *v.* Verity, L. R. 6 C. P. 206. Such a notion, as there pointed out, would virtually repeal the statute of limitations. See Philpott *v.* Kelley, 3 A. & E. 106.